

MEMORANDUM

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THROUGH: Leonard J. Koczur
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DATE: December 23, 2002

SUBJ: Comments on Proposed Rulemaking
45 CFR Part 1611, Financial Eligibility

This memorandum provides the OIG's comments on proposed revisions to 45 CFR Part 1611, published in the Federal Register for comment on November 22, 2002.

Group Representation

The proposed rule allows the representation of ineligible individuals, 1611.8(a)(1),(2), and groups without specific consideration of financial eligibility, 1611.8(a)(3),(4) and gives insufficient guidance on determining and documenting eligibility, 1611.8(a) and (b).

Representation of ineligible individuals

Sections 1611.8(a)(1) and (2), allow representation of a membership group if at least a majority of its membership is eligible and a non-membership group if at least a majority of those forming or operating the group is eligible. This will result in financially ineligible individuals receiving legal assistance. The regulation allows legal assistance to be provided to financially ineligible individuals as long

as they are group members. Grantees could comply with the regulation and still provide assistance to such financially ineligible individuals.

The proposed rule requires that a majority of group members be financially eligible in order to qualify for assistance. Conversely, up to 49 percent of the members could be ineligible but receive service as members of the group. The problem is compounded because the composition of the group would likely change over time. The majority of group members at any point could be financially ineligible but still receive assistance because the group was eligible at one time.

In addition, the proposed rule could be interrupted as establishing different requirements for individuals and groups. An individual who fails the income test would be ineligible for assistance. However, as a member of a group the individual could receive assistance if the majority of the group were eligible.

The OIG suggests that the proposed rule be modified to require all group members to be financially eligible. If this is not practical, than significantly more than a simple majority must be eligible. We suggest something in the range of 80 to 90 percent. It must be recognized that anything less than one hundred percent eligible individuals increases the likelihood that ineligible individuals will be provided legal assistance.

No specific consideration of financial eligibility

The proposed rule, in certain instances, allows representation without any specific consideration of financial eligibility. Section 1611.8(a)(3) and (4), allows representation if “the group has as its principal function or activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance,” or “the group has as its principal function or activity the furtherance of the interests of those persons in the community who would be financially eligible for LSC-funded legal assistance and the representation sought relates to such function or activity.” This section, while allowing representation of groups that serve the interests of eligible clients, does not require that the financial eligibility of individuals to be determined. This is inconsistent with the requirements of the LSC Act, which authorizes the providing of financial assistance to programs “furnishing legal assistance to eligible clients,” not to programs furnishing legal assistance to those who serve eligible clients. The proposed rule provisions 1611.8(a)(3) and (4) exceeds LSC’s statutory authority and should be deleted.

Insufficient guidance

The proposed rule provides insufficient guidance for the determination and documentation of eligibility.

The proposed rule, Section 1611.8 (a) allows group representation when a recipient determines that the group “has no practical means of obtaining private counsel.” This requirement presumably, but not explicitly, goes to financial ability to obtain counsel. The LSC Act requires that financial eligibility be determined on the basis of factors more specific than a general lack of ability to pay. See, 42 USC Section 2996f(a)(2)(A), requiring the establishment of maximum income levels, and 42 USC Section 2996f(a)(2)(B), requiring that certain factors be considered in determining eligibility such as assets and fixed debts. We suggest that the rule be modified to state that groups are eligible for assistance only if they do not have the financial means to engage legal counsel and have been turned down when requesting pro bono assistance.

Section 1611.8(b) requires recipients to “collect information that reasonably demonstrates that the group . . . meets the eligibility requirements set forth herein.” This allows group eligibility to be determined by an undefined “reasonableness” standard and could result in the representation of groups that do not meet the requirements of 1611.8 (a)(1) and(2). We suggest that the rule require that the eligibility of groups be documented in the same manner as is required for individual clients.

Retainer agreements

The proposed rule specifically requests comments on the proposal to eliminate the requirement that recipients obtain retainer agreements. The supplementary information provided with the proposed rule acknowledges that retainer agreements are professionally desirable but proposes eliminating the requirement, primarily because it is not statutorily mandated. The OIG recommends that the rule include a retainer agreement requirement as recommended by the LSC representatives to the negotiated rulemaking working group.

Retainer agreements, which set out the parameters of the attorney-client relationship, provide the means for ensuring that recipients comply with their ethical duty to adequately inform their clients and when required, receive their consent. Without this, recipients’ clients would be justified in assuming that whenever they retain a legal services lawyer, they are entitled to full service representation and that there are no limitations on the services to be provided. Retainer agreements not only ensure that clients are fully informed about the scope of the representation, they also ensure that the recipients are protected from claims that promised service was not provided.

The Corporation has a statutory duty to “ensure that activities under this title are carried out in a manner consistent with attorneys’ professional responsibilities, 42 USC Section 2996e(b)(3), and to “[e]nsure the maintenance of the highest quality of service and professional standards [and] the preservation of attorney-client relationships, 42 USC Section 2996f(A)(1). By requiring

retainer agreements, the Corporation will be acting in accordance with this duty. Congress, moreover, indicated its intention that retainer agreements be obtained when it specifically listed them as documents to which LSC has access under section 509(h) of the appropriations act.

For the reasons stated above, the OIG recommends inclusion of a retainer agreement requirement in Part 1611.

Thank you for your consideration of our comments. The OIG is available to discuss these comments before the draft final rule is presented to the LSC Board of Directors.